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NO. 36299-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LAURA MOEURN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

Laura Moeurn appeals his conviction of second degree assault, with a deadly weapon enhancement. Mr. Moeurn argues the State failed to prove beyond a reasonable doubt that he committed the assault. Further, he contends that the deputy prosecutor's prejudicial misconduct in closing argument, fundamentally misstating the State's burden of proof, was intended to and did cause the jury to convict him in the absence of sufficient evidence. Finally, Mr. Moeurn contends the trial court miscalculated his offender score.

1. THE STATE FAILED TO OFFER PROOF BEYOND A REASONABLE DOUBT THAT MR. MOEURN COMMITTED THE CRIME CHARGED

In a criminal prosecution, the Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Additionally, the identity of a criminal defendant and his presence at the scene of a crime must be proven beyond a reasonable doubt. State v. Thomson, 70 Wn.App. 200, 211, 852

P.2d 1104 (1993), review denied, 123 Wn.2d 877 (1994). Evidence is sufficient only if, in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Every witness testified that the person who struck Clayton Wenger was the person with whom he had argued inside the bar. RP 90, 95,106-07, 164, 169, 192, 197. Thus, the only dispute was who that person was.

A number of witnesses who knew both Mr. Moeurn and Mr. Chum testified Mr. Chum was the one who argued with Mr. Wenger inside the bar, that he along with Dara Phin fought with Mr. Wenger in the alley, and that Mr. Chum hit Mr. Wenger with a board. These witnesses described Mr. Chum as wearing a red shirt and red hat that evening. RP 173, 205, 233. Each of these witnesses described Mr. Moeurn as trying to get his two acquaintances into the car. RP 195, 215. Ms. Barnett recalled seeing an individual trying to get others into the car, only to have them run back into the fight. RP 64. These witnesses testified that Mr. Chum and Mr. Phin quickly fled the scene. RP 169-70, 218.

The State responds, "the State produced three witnesses that identified the appellant to varying degrees of certainty." Brief of Respondent at 5. Indeed the State did present three witnesses; Steven Vetter; Cody Ross and Crystal Barnett.

Mr. Vetter, explained "there was a couple of people that looked alike" an apparent reference to the number of Asian males present in the alley. RP 84. Mr. Vetter further explained, with a noticeable lack of conviction, that he identified Mr. Moeurn because

> he was pretty well at that time – be about the same – that size and the color of the jeans, and he was – the clothing that he was wearing that matched him – the description that I gave the officer.

RP 84-85.

Mr. Ross testified the assailant wore a red hat and red shirt, RP 93, a description which matched Mr. Chum, not Mr. Moeurn. RP 205, 218, 233. In the weeks following the incident, when he was shown a photographic montage containing a picture of Mr. Moeurn, Mr. Ross identified someone other than Mr. Moeurn. RP 146. During trial Mr. Ross was shown a photograph of Mr. Chum, Exhibit 11, and identified him as the person who struck Mr. Wegner, apparently oblivious to the fact that Exhibit 11 was not a picture of Mr. Moeurn. RP 96. Despite the fact that he had at least twice

identified someone else as the assailant Mr. Ross maintained he was 95% certain that Mr. Moeurn was the person who hit Mr. Wenger. RP 93.

After police arrived, Ms. Barnett identified Mr. Moeurn as he sat in the back of a patrol car with an officer shining a flashlight on him. RP 25. Despite the suggestibility of such an identification procedure, Ms. Barnett allowed she was only 75% certain that Mr. Moeurn was the person who assaulted Mr. Wenger. RP 75

It is not a question of credibility nor looking at the evidence in the light most favorable to the State. Indeed, in the light most favorable to the State the evidence established Mr. Chum, Mr. Moeurn or the person whom Mr. Ross identified in the montage, assaulted Mr. Wenger. Rather than prove beyond a reasonable doubt that Mr. Mourn committed the offense, the State prove several people may have. The Court must reverse Mr. Moeurn's conviction.

2. PROSECUTORIAL MISCONDUCT DEPRIVED MR. MOEURN A FAIR TRIAL

In closing argument, the deputy prosecutor, discussing Ms. Barnett's testimony, asked the jury "Did the defense attorney give you a reason to doubt?" RP 256-57. The deputy prosecutor told

the jury not to become distracted by arguments concerning Ms. Barnett's self-confessed 75% level of certainty in her identification of Mr. Moeurn. The deputy prosecutor told the jury

> An abiding belief is one you're going to take out of here. After all the testimony, after all the deliberations, most importantly, in the end you simply still just believe that he's guilty. That's an abiding belief.

RP 257-58. The deputy prosecutor continued:

> You're probably wondering how you're going to work this out. This is a situation where you're given two stories and they're mutually exclusive. Both of them can't be true. The defendant or was it Kim? One of these guys hit him. Right now you know what's going on. You have your belief, but you probably have your doubt. And then you are asking yourself, Well does my doubt reach reasonable doubt. As I said before, you don't even have to worry about your doubt. Think of your duty. What do you believe? Don't ask yourself, am I reasonable? Just say, what do I believe? . . . . But also don't' worry about this reasonable person thing, this little fiction that lawyers talk about. You are reasonable people. . . . . The only thing that matter is what you believe. Just look into your heart and you know what you believe.

RP 262-63.

The prosecutor responds that Mr. Moeurn fails to take the argument in context. Yet the prosecutor makes no effort to explain in what context it is proper to argue "As I said before, you don't even have to worry about your doubt. Think of your duty. What do

you believe? Don't ask yourself, am I reasonable? Just say, what do I believe?" is proper. Indeed, there is no context in which dismissing the reasonable doubt standard as a "little fiction that lawyers talk about" is defensible.

The deputy prosecutor's comments were intended to circumvent the substantial doubts standing in the way of a conviction. The resulting prejudice of the State's misconduct was intended to and did have a substantial impact on Mr. Moeurn's Fourteenth Amendment right to a fair trial. The only meaningful remedy for these violations is a new trial.

3. THE TRIAL COURT MISCALCULATED MR. MOEURN'S OFFENDER SCORE BY INCLUDING A PRIOR OFFENSE

As set forth in his prior brief, the State failed to prove Mr. Moeurn's 1995 adjudication should be included in his offender score; that it had not washed out. The State concedes the case should be remanded to "reevaluate" the offender score. Brief of Respondent at 10. The Court should certainly accept the State's concession that the offender score is incorrect. However, the proper remedy for the erroneous inclusion of a washed out offense, is not to "reevaluate" the offender score. Instead, the remedy is to resentence the individual without inclusion of the offense in

question, even if no objection was raised at the original sentencing hearing. In re the Personal Restraint Petition of Goodwin, 146 Wn.2d 861, 877-78, 50 P.3d 618 (2002). Thus, the proper remedy is to remand Mr. Moeurn's case for resentencing using the correct offender score; "0."

B. CONCLUSION

For the reasons above, and those set forth in his prior briefing, this Court must reverse Mr. Moeurn's conviction and sentence.

Respectfully submitted this 20th day of March, 2008.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, v. LAURA MOEURN, Appellant.	)	COA NO. 36299-6-II

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 20TH DAY OF MARCH, 2008, A COPY OF *APPELLANT'S REPLY BRIEF* WAS SERVED ON THE PARTIES BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL:

[X] KRAIG NEWMAN
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MONTESANO, WA 98563

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SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF MARCH, 2008

X Ann Joyce